# STATE OF MICHIGAN

# COURT OF APPEALS

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| DRUMMOND ISLAND YACHT HAVEN INC.,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>January 16, 2014 |
| v | No. 308274<br>Chippewa Circuit Court |
| SOUTH FLORIDA SOD, INC. and WILEY MCCALL,[1]<br><br>Defendants-Appellees. | LC No. 11-011697-AV |

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| DRUMMOND ISLAND YACHT HAVEN INC.,<br><br>Plaintiff-Counterdefendant-Appellee, | |
| v | No. 308483<br>Chippewa Circuit Court |
| SOUTH FLORIDA SOD, INC.,<br><br>Defendant-Counterplaintiff-Appellant. | LC No. 11-011697-AV |

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

In Docket No. 308274, plaintiff-counterdefendant, Drummond Island Yacht Haven Inc. ("plaintiff"), appeals by leave granted an order affirming in part and reversing in part the district court judgment entered in favor of plaintiff after a bench trial. In Docket No. 308483, defendant-counterplaintiff, South Florida Sod, Inc. ("defendant"), sought leave to appeal the same order of the circuit court. We granted leave and consolidated the two appeals. *Drummond Island Yacht Haven Inc v South Florida Sod Inc*, unpublished order of the Court of Appeals, entered July 26,

[1] Defendant Wiley McCall, the owner and president of South Florida Sod, Inc., was dismissed from the case with prejudice by stipulation.

2012 (Docket Nos. 308274 and 308483). We reverse the circuit court judgment and reinstate the district court's judgment with respect to the amendment of plaintiff's claim after defendant removed the case to district court. We reverse the circuit court judgment regarding the finance charges and remand to the trial court to recalculate damages consistent with this opinion.

## I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff owns a marina on Drummond Island in Chippewa County. Rental of docking space is a part of plaintiff's business. In addition to operating the marina, plaintiff constructs docks and obtains the necessary permits for customers from government agencies. Defendant became a customer of plaintiff in late 2006 after defendant purchased a private island, Burnt Island, just south of Drummond Island. Defendant began buying goods from plaintiff's marina, for which plaintiff billed defendant monthly. Defendant bought gas, oil, and other store items on an open account. Defendant regularly and promptly paid its bills. Defendant also purchased plaintiff's boat repair services, a cabin rental, and winter storage for defendant's boat. In summer 2007, defendant began docking its boat at plaintiff's marina. Plaintiff charged defendant for dockage in the same manner as plaintiff had charged Burnt Island's former owner. Plaintiff's practice was to bill customers in winter (at the end of the calendar year) for the previous summer's docking charges.

In the winter of 2007/2008, plaintiff sent defendant a bill that included a charge of $5,910.00 for dockage during summer 2007. The bill stated that plaintiff was charging defendant for dockage when defendant's boat was left at plaintiff's marina "for an extended period of time." Plaintiff does not charge for intermittent docking, such as docking for a few hours to go to the store, or even overnight.

Defendant disputed the bill. Plaintiff's general manager, Joseph DePaul, and plaintiff's owner, G. Dennis Bailey, had phone discussions about the matter with defendant's owner, Wiley McCall. McCall complained that his boat was not docked at plaintiff's marina very often during summer 2007, and argued that 2007 was the first full summer that he (McCall) was there. McCall reminded Bailey that defendant buys all of its gas and supplies from plaintiff. Ultimately, Bailey agreed to waive the docking charges for summer 2007.

According to DePaul, he and McCall agreed in their discussions that going forward, if defendant docked its boat at plaintiff's marina, plaintiff would charge a docking fee. DePaul told McCall that the waiver of the docking fees was for 2007 only. Plaintiff sent a revised bill to defendant, which contained the handwritten notation: "Wiley, if your boat is left at the dock for an extended period of time, a dockage charge will need to be discussed."

During summer 2008, DePaul and Bailey kept detailed records of the times that defendant's boat was docked at plaintiff's marina. DePaul testified that "[t]here were weeks, and sometimes months on end" that defendant's boat was left docked at the marina. One of defendant's boats was docked there for most of the summer and was never used. Plaintiff's records showed, for example, that one of defendant's boats was left at plaintiff's dock from May 10, 2008 until July 2, 2008. At the end of the summer, plaintiff billed defendant for seasonal dockage. Plaintiff considered the various possible rates, weekly, monthly, or seasonal, based on

defendant's dock usage. In light of the amount of time that defendant's boats were docked with plaintiff, plaintiff determined that the least expensive rate to apply was the seasonal rate.

Plaintiff also performed services for defendant related to obtaining necessary government permits for improvements on defendant's island. Bailey spoke with McCall about McCall's interest in building a steel dock and dredging an existing dock. Bailey told McCall that the permitting service would cost defendant only the amount of the permit fees paid to the government. According to Bailey, he explained to McCall that the expenses that plaintiff would incur in obtaining the permits would be part of the price of the construction and dredging work that plaintiff would perform. According to McCall, he told Bailey that he might decide not to build the dock, or he might not have plaintiff do the construction, and McCall told him, "not a problem."

The Department of Environmental Quality requires a $500.00 application fee for the steel dock permit, which plaintiff advanced for defendant. Plaintiff obtained the two permits for defendant. But ultimately, plaintiff did not perform the construction and dredging because defendant hired another company to do the work. Plaintiff billed defendant for plaintiff's services to acquire the permits. The charge for the permitting services for the steel dock project was $2,003.42. Plaintiff's charge for obtaining the permit to dredge the existing dock was $601.88. Defendant paid plaintiff the $2,600.00 for the permit services in September 2008.

Defendant's account was current through September 2008. Sometime thereafter, a dispute arose concerning the permitting charges. McCall was unaware that he would be charged for the permitting, and he had no intention of paying for it. In response to McCall's concerns, Bailey explained that there would be no charge for the permitting services if plaintiff ultimately performed the work for defendant. Bailey told McCall that he (Bailey) had expended a lot of time and money on the permitting process for defendant. McCall said that the bill for the permitting services was paid in error by one of defendant's employees, without McCall's approval.

Throughout 2009, defendant's payments were late. Defendant refused to pay the summer 2008 docking charges. Plaintiff's bills that included past due amounts allegedly contained a notice that a standard 1.5% late fee would apply[2], and each bill contained a detailed breakdown of each month's finance charge. McCall did not immediately become aware of the interest charges on plaintiff's invoices because he usually does not review them. An employee of defendant sends out checks without McCall having to sign them. When McCall learned of the outstanding amounts due, he wanted plaintiff to apply the permitting payment that he claimed was made in error. Defendant made its own adjustments to plaintiff's bills by deducting the amount of the permitting services that defendant had paid, from the amount owed.

[2] The notion that plaintiff's bills included a notice that a 1.5% late fee would apply was introduced at trial through testimony. There was no documentary evidence produced at trial regarding the 1.5% late fee.

The only writing to evidence the finance terms are the bills that plaintiff sent to defendant. Plaintiff's invoices provide that payment is due within thirty days of billing and state: "A FINANCE CHARGE WILL BE INCURRED ON ANY BALANCE OVER 30 DAYS." If an invoice is not paid within thirty days, plaintiff's bookkeeper, Lynn VanAlstine, testified that she stamps the invoice with red ink showing a 1.5% per month (compounded to 18% per year) late fee will be charged if the outstanding balance is not paid within the thirty-day period. If the balance remains unpaid, the matter is taken to Bailey, who makes the determination to charge the late fee.

However, despite the testimony regarding the red ink stamp, it was uncontested at trial that no written contract existed between the parties regarding the open account.[3] VanAlstine testified that the parties did not have a written agreement regarding the finance charges:

> *Q.* Is there some sort of written policy that Drummond Island Yacht Haven has with regard to the assessment of this money?
>
> *A.* No, um, as I said, over all, it's after thirty (30) day period. We normally stamp it for a month or so, with a red stamp, stating one point five (1.5) percent per month. And then I take them to the owner and we start assessing the late fees.
>
> *Q.* When do you start assessing the late fees?
>
> *A.* Ah, it's normally after, probably been gone [sic] sixty (60) days is our norm. The stamp normally goes once out before we ever assess the late fees.
>
> *Q.* That's pretty much up to Mr. Bailey?
>
> *A.* Yes.
>
> *Q.* And he instructs you on what to do?
>
> *A.* Yes, when I take it to him.
>
> * * *
>
> *Q.* Ah, there's no – I do. Ms. VanAlstine, is there any kind of a contract that your company had with South Florida Sod which, ah, set up this charge account, the open account, whatever you call it?
>
> *A.* No, there's no contract on it. We have a storage agreement with him; other than that, no.

[3] Plaintiff does have a written agreement with defendant for the storage of defendant's boat during the winter, but nowhere in the agreement does it indicate that a finance charge would be applied if payment is late.

*Q.* No other written agreements?

*A.* No.

*Q.* And the only notice that South Florida Sod got that there was going to be an assessment was that language that's on the bottom of the invoice that says it may be charged?

*A.* There's two (2) ways that we do it, and I, going back to November of '06 when I looked at the invoices, the statements, it was on the bottom of that as far back as '06. As I said, then we also have a red stamp if a bill is not paid that we start putting it on it, that states a one point five (1.5) percent.

*Q.* And that's it.

*A.* That's it.

Bailey similarly testified to the lack of a written contract:

*Q.* Did you have any written agreement with any customer that indicated that if they were, had not paid for thirty (30) days, that you would charge them one point five (1.5) percent per month or eighteen (18) percent per year?

*A.* A written agreement?

*Q.* Correct.

*A.* No, it's just industry norm.

*Q.* And how is that industry norm communicated to your various customers?

*A.* I think they do business in many places and understand that; it, um, we, um, I believe on the bottom of our statement, and Lynn would have to clarify that, have a statement stating there would be a finance charge.

*Q.* Doesn't say would be, says may be.

*A.* Okay, then you have it there.

*Q.* Yes. Any kind of written agreement?

*A.* No.

*Q.* Any kind of a written statement indicating -- did you have any kind of a revolving credit agreement with any of your customers, with South Florida Sod?

*A.* It's called a handshake.

*Q.* That's it?

*A.* That's correct.

*Q.* Nothing in writing.

*A.* It comes with our bills. Honesty of doing business.

McCall further testified to the lack of a written agreement with plaintiff regarding the finance charges:

> *Q.* Did you ever have any kind of a written agreement with Mr. Bailey, or his company, wherein as a part of that agreement you agreed that if you failed to make payments within thirty (30) days, an interest rate would be charged?
>
> *A.* No, Sir. The only conversation we ever had about that, that's when I first opened the account, and he said: do you want to open your account here? I said: well, we try to pay our bills every six (6) months. And he said: that's okay, as long as you pay the bill, we don't care, just pay the bill.

In 2010, plaintiff filed a small claims case against defendant seeking $2,386.78. Defendant owed more than $5,000.00, but plaintiff wanted to get paid what it could get through the small claims process, which had a $3,000.00 jurisdictional limit. The $2,386.78 was the amount owed on one of the invoices.

Defendant removed the case to the general civil division of the district court on May 24, 2010. Defendant filed an answer and a countercomplaint. Defendant claimed that plaintiff violated the Retail Installment Sales Act (RISA), MCL 445.851, *et seq*., by imposing a finance charge without a written agreement. Alternatively, defendant asserted that plaintiff's finance charge violated the usury statute, MCL 438.31. Defendant also argued that it had a contract with plaintiff for free dockage in 2008.

On June 24, 2010, plaintiff filed a first amended complaint, with leave of the court. Plaintiff increased the amount that it was seeking to $5,215.08. Defendant moved for summary disposition, arguing that plaintiff waived its right to seek a recovery that exceeded the $3,000.00 threshold of small claims court by failing to strictly comply with MCR 4.302(D), which requires that "the actual amount of the claim must be stated" even if it exceeds the jurisdictional limit. The district court disagreed and denied defendant's motion on this basis. Defendant also argued that it was entitled to summary disposition on the RISA and usury claims. The district court found that issues of fact for trial existed, and denied summary disposition on these grounds as well.

Following trial, the district court issued an opinion finding in favor of plaintiff and awarding $5,215.08. The court ruled:

> Defendant argues that since this case started in Small Claims, it is limited to a $3,000.00 ceiling. This has been addressed on the record and, even though Defendant continues to waste time on the argument, the Court will not.

Defendant's argument continues to fail. Once the matter moved to General Civil filings, the Plaintiff was able to amend its pleadings.

Defendant argues the Usury and Retail Installment Sales Act should apply to this matter. The Court looks to MCLA 450.1275 and MCLA 438.61. The parties may agree to a rate of interest. Each month, the Defendant was informed that late fees were applicable and, beginning in 2009, late fees were shown on the monthly bill cycle. Pursuant to MCLA 440.1205 and the ruling in Dart Bank v Byron, 2008 WL 2514183 (2008), this is standard practice and usage among credit billings. The rate found in this case is also a standard rate.

The Court is not swayed by the Defendant's time-price differential argument and does not accept MCLA 438.31 as controlling.

The Court finds it inconceivable that anyone in today's economy would believe that they could purchase goods and services on credit and not pay a fee. Neither Plaintiff nor Defendant operated in such a manner with others, thus the Court does not believe they would do so with each other.

Regarding the issue of the permit/dredge fees, this was truly a bad business practice perpetrated by both parties. For two (2) men who have made their fortunes the hard way, they suddenly seemed to forget the basic rule of Business 101: get it in writing.

Stating an old adage: different facts, different outcome. Defendant was aware of plaintiff's actions on his behalf to secure construction permits. He was well aware of costs associated with said actions. Plaintiff was aware that he did not have a written agreement, but was hoping for the big "payday" in the end of the process.

When considering this issue, the Court looks to the theory of unjust enrichment. Had the Defendant chosen not to use the permits and the work done on his behalf, the Court might have found differently. However, the Defendant did use the Plaintiff's efforts to further his cause. Based on the principles of fairness, equity, and unjust enrichment, the Defendant must pay reasonable costs for the work done, whether by the Plaintiff or by someone else. Having nothing before the Court to show the fee unreasonable, the Court must find it to be so.

The Court believes that with different facts, there may have been a different outcome regarding the interest applied to the $2,605.30. Had Defendant objected anywhere in writing, the Court would have stayed the applied interest pending a decision. Without a valid objection, the charges remain.

Although oral contracts are recognized in the legal world, the Defendant's argument that an oral agreement exists here cannot prevail against the writings accepted into evidence, being Exhibit Two (2) and Exhibit Six (6), and the lack of a written objection to Plaintiff's January 2009 billing.

> The Court spent a great deal of time reviewing this matter before rendering a final decision. Based on the testimony and evidence presented, the Court finds for the Plaintiff on all arguments. Plaintiff is to prepare a judgment to submit by stipulation or a seven (7) day notice of presentment.

Defendant appealed to circuit court. The circuit court affirmed in part and reversed in part. The circuit court reversed with respect to the district court allowing plaintiff to amend its complaint to increase the amount of damages sought, and remanded for entry of judgment in the amount that plaintiff originally sought in the small claims case. In all other respects, the circuit court affirmed the district court's decision. The circuit court ruled:

> Plaintiff's testimony clearly established that they [sic] knew the actual claim at the time of filing was $5,215.08. The rule is clear in that it states a waiver exists of the amount over the statutory maximum.
>
> Had plaintiff complied with MCR 4.302(D) upon removal to the general civil decision of the 91st District Court the plaintiff would have been free to amend his [sic] complaint to reflect the larger amount. Absence [sic] compliance with MCR 4.302(D) plaintiff is barred from doing so. To hold otherwise would make MCR 4.302(D) a nullity. The court rules must be read in their entirety and consistent with each other to arrive at the correct decision.
>
> There being no further clearly erroneous findings by the lower court the appeal is granted in part and denied in part.
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> The matter is remanded to the lower court to enter a judgment in the amount of $2,386.78, plus costs in the amount of $105.00 and statutory interest from May 26, 2011. Both parties prevailed in part, and were reversed in part. Therefore neither party is awarded appellate attorney fees and costs.

## II. STANDARD OF REVIEW

Issues concerning the interpretation, and application, of statutes and court rules are questions of law that this Court reviews de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *Danse Corp v City of Madison Heights*, 466 Mich 175, 178; 644 NW2d 721 (2002). This Court reviews a trial court's findings of fact following a bench trial for clear error. *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011).

## III. AMENDMENT OF CLAIM

Plaintiff first argues that the circuit court erred when it concluded that plaintiff waived its right to increase the amount of the claim once it was removed from small claims court to the district court. We agree.

On appeal, plaintiff focuses on MCL 600.8425, which specifically allows parties in small claims cases to amend their pleadings to increase the amount of a claim after removal to a different court:

> (1) A person having a claim in excess of the applicable jurisdictional amount as prescribed by section 8401 may institute an action in the small claims division but may not claim or recover more than the jurisdictional amount.
>
> (2) *If an action properly commenced in the small claims division is removed to the district court* or to any other court pursuant to section 8408 or 8423, *either party may amend his or her own pleadings to increase the amount claimed* upon payment of any difference in the applicable filing fee. [MCL 600.8425 (footnotes omitted, emphasis added).]

Defendant argues that plaintiff's action was not "properly commenced" in the Small Claims Division because plaintiff failed to strictly comply with MCR 4.302(D), which requires that a plaintiff state the actual amount of the claim, even if it is in excess of the jurisdictional limit. The rule provides:

> (D) Claims in Excess of Statutory Limitation. *If the amount of the plaintiff's claim exceeds the statutory limitation, the actual amount of the claim must be stated*. The claim must state that by commencing the action the plaintiff waives any claim to the excess over the statutory limitation, and that the amount equal to the statutory limitation, exclusive of costs, is claimed by the action. A judgment on the claim is a bar to a later action in any court to recover the excess. [MCR 4.302(D) (emphasis added).]

The rule's requirement that a plaintiff state the full amount of its claim serves to operate as a waiver to the amount by which the full claim exceeds the small claims jurisdictional limit. By its plain language, MCR 4.302(D) gives notice that a (small claims) "judgment on the claim is a bar to a *later* action in any court to recover the excess." (Emphasis added.) Here, plaintiff did not bring a later action for the excess. Rather, defendant opted to remove the case to the general civil division of the district court. Once removed from the small claims division, the proceedings were "governed by the rules applicable to other civil actions." MCR 4.306(E). These rules include the ability to amend pleading with leave of the court, which plaintiff did in this case. See MCR 2.118.

The circuit court concluded that allowing plaintiff to increase the amount of its claim would render MCR 4.302(D) a nullity. This Court uses the principles of statutory construction when interpreting a Michigan court rule. "We begin by considering the plain language of the court rule in order to ascertain its meaning. The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Henry v Dow Chemical Co*, 484 Mich 483, 495; 772 NW2d 301 (2009) (quotation marks and citation omitted). In so doing, "[t]he Court should avoid construing a court rule in a manner that results in a part of the rule becoming nugatory or surplusage." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 484; 633 NW2d 440 (2001).

Contrary to the circuit court's conclusion, allowing plaintiff to amend its complaint would not have rendered the court rule void. Regardless whether plaintiff stated the full amount owed to it by defendant on the small claims affidavit, the court rule articulates the preclusive effect of a small claims *judgment* on any future attempt to recover the excess. No small claims

judgment was entered, the court rules governing small claims cases no longer applied after removal, and MCL 600.8425(2) expressly allows amendment of the claim after removal. The district court's order allowing amendment of the complaint was not inconsistent with MCR 4.302(D), or an alleged noncompliance with the rule.

## IV. FINANCE CHARGES

Defendant argues that both lower courts erred in awarding finance charges and that the same were barred by RISA, MCL 438.31, and MCL 450.1275. We disagree that RISA is invoked in this matter, but agree that MCL 438.31 and MCL 450.1275 bar the assessment and collection of the finance charges. We further hold that the lower courts erred in their reliance on the UCC.

### A. RETAIL INSTALLMENT SALES ACT

Defendant concedes on appeal that the trial court properly concluded that plaintiff was entitled to charges for docking fees and that defendant was not entitled to a credit on its account for payments relating to permits obtained by plaintiff. However, defendant argues that the lower courts erred in failing to conclude that plaintiff's finance charges violated RISA. We disagree.

Contrary to parties' contention, the finance charges were not time price differentials. MCL 445.852(j) defines a "retail installment contract":

> an instrument entered into in this state evidencing a secured or unsecured retail installment transaction, and includes a chattel mortgage, a security agreement, a conditional sale contract, or a bailment or lease contract if the bailment or lease contract requires the bailee or lessee to pay an amount equal to or greater than the value of the bailed or leased good, and additionally provides that the bailee or lessee shall become, for no additional consideration or for nominal consideration, the owner of the good on full compliance with the bailment or lease contract. Retail installment contract does not include any of the following:
>
> (*i*) A rental-purchase agreement as defined in section 2 of the rental-purchase agreement act, 1984 PA 424, MCL 445.952.
>
> (*ii*) A retail charge agreement.
>
> (*iii*) An instrument evidencing a sale made pursuant to a retail charge agreement.

A retail installment transaction is defined as "any transaction in which a retail buyer purchases goods or services from a retail seller pursuant to a retail installment contract or a retail charge agreement that provides for a time price differential and under which the buyer agrees to pay the unpaid balance in 1 or more installments." MCL 445.852(k). MCL 445.852(n) defines a "time price differential":

> the amount a buyer pays or is required to pay for the privilege of purchasing goods or services in installments over a period of time. Time price differential does not include the amount, if any, charged for insurance premiums, delinquency

> charges, attorney fees, court costs, or official fees, but does include all other charges included in a finance charge as that term is defined in section 106 of chapter I of the truth in lending act, 15 USC 1605.

Here, the parties did not agree to a retail installment contract. Instead, defendant procured numerous services from defendant on an open account. Plaintiff did not permit defendant to pay for the services in one or more installments. Rather, plaintiff would bill defendant at a later date for each service incurred. Thus, the trial court did not err in concluding that RISA was inapplicable in this case.

B. AGREEMENT IN WRITING PURSUANT TO MCL 438.31 AND MCL 450.1275

Defendant argues that the finance charges imposed by plaintiff, compounded to 18% annually, violated MCL 438.31 and MCL 450.1275 because the parties failed to agree in writing to an interest rate that exceeded the statutory maximum. On the other hand, plaintiff contends that defendant's receipt of the billing statements that indicated the imposition of the finance charges was sufficient to constitute a written agreement. We agree with defendant.

MCL 438.31 provides: "The interest of money shall be at the rate of $5.00 upon $100.00 for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum." However, "A domestic or foreign corporation, whether or not formed at the request of a lender or in furtherance of a business enterprise, *may by agreement in writing, and not otherwise*, agree to pay a rate of interest in excess of the legal rate and the defense of usury shall be prohibited." MCL 450.1275 (emphasis added). "Interest" is defined as "[c]ompensation allowed by law or fixed by the respective parties for the use or forbearance of money, a charge for the loan or forbearance of money, or a sum paid for the use of money, or for the delay in payment of money." *ANR Pipeline Co v Dept of Treasury*, 266 Mich App 190, 204; 699 NWd 2d 707, 715 (2005) (internal citations omitted).

In construing a statute, a court must give effect the Legislature's intent. *Tellin v Forsyth Tp*, 291 Mich App 692, 700; 806 NW2d 359 (2011). This Court first looks at the language of the statute itself in determining the Legislature's intent. *Id*. at 701. "The Court gives the words of the statutes their plain and ordinary meaning and will look outside the statutory language only if it is ambiguous." *Id*. "[W]here that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed – no further judicial construction is required or permitted, and the statute must be enforced as written." *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005) (original citation omitted).

MCL 438.31 is unambiguous, in that it provides that interest rates greater than five percent must be in writing. See MCL 438.31. Nonetheless, the parties, as corporations, were permitted to agree to an interest rate in excess of the statutory maximum set forth in MCL 438.31. The statutory language in MCL 450.1275 is unambiguous: the parties "may by agreement in writing, and not otherwise, agree to pay a rate of interest in excess of the legal rate and the defense of usury shall be prohibited." See MCL 750.1275. Here, the unrebutted testimony established that the parties failed to agree in writing to interest of 18% per annum. Bailey and VanAlstine testified that plaintiff's policy was to assess the interest rate for

statements that were past due by 30 days. The assessment was in Bailey's sole discretion. In other words, plaintiff made the unilateral decision to impose an interest rate greater than the statutory limitation. Absent an "agreement in writing" within MCL 450.1275 of the Business Corporation Act, plaintiff is barred from recovering usurious interest from defendant. See MCL 438.32 ("Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns.")

Nonetheless, defendant concedes on appeal that it paid finance charges in September 2008 ($85.90), January 2009 ($29.08), and February 2009 ($77.63).[4] Consequently, defendant waived the usury defense with respect to these payments because the usurious interest was voluntarily repaid. See *Matter of Estate of Backofen*, 157 Mich App 795, 800-801; 404 NW2d 675 (1987) (the usury defense is waived only to the extent that usurious interest is voluntarily repaid). Thus, the usury defense was waived with respect to these payments. The usury interest that was voluntarily paid must be applied to the principal outstanding debt. See *Waldorf v Zinberg*, 106 Mich App 159, 164; 307 NW2d 749 (1981). If the principal debt has been extinguished, defendant forfeits any usury interest that was voluntarily paid. See *Michigan Mobile Homeowners Ass'n v Bank of Commonwealth*, 56 Mich App 206, 216-217; 223 NW2d 725 (1974) (plaintiff cannot bring an independent cause of action for usurious interest that has been paid).

## C. UNIFORM COMMERCIAL CODE

Contrary to the lower courts' conclusion, the Uniform Commercial Code (UCC) was inapplicable in this case. Article Two of the UCC governs the relationship between the parties involved in "transactions in goods." MCL 440.2102; *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 527; 538 NW2d 424 (1995). Michigan Courts apply the predominant factor test to determine whether a contract primarily involves the sale of goods, actionable under the UCC, or the sale of services, actionable under common law. *Id*. "If the purchaser's ultimate goal is to acquire a product, the contract should be considered a transaction in goods, even though service is incidentally required. Conversely, if the purchaser's ultimate goal is to procure a service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of this service." *Farm Bureau Mutual v Combustion Research Corp*, 255 Mich App 715, 723; 662 NW2d 439 (2003), quoting *Neibarger v Universal Cooperatives Inc*, 439 Mich 512, 536-537; 486 NW2d 612 (1992). The UCC did not apply in this case because the primary purpose of the underlying contract was the provision of services, rather than goods. For example, defendant contracted with plaintiff to dock defendant's boats throughout the summer and store defendant's boats during the winter. After defendant docked its boat at plaintiff's marina, plaintiff's employees would fill the boats with gasoline and, on

[4] The Invoice Statements indicate that the payments were for "Finance Charges July," "Finance Charges December," and "January Finance Charge," respectively.

occasion, move the boat while the McCalls went shopping. In addition, defendant hired plaintiff to obtain dredge and dock work permits. Consequently, the trial court erred in relying on the UCC to conclude that the parties agreed to a contract in writing, within the meaning of MCL 450.1275, to the imposition of finance charges above the statutory limitation in MCL 438.31.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly